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Supreme Court, U.S.
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No. 97-488 SEP 15 1997

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DONALD C. SCHIRM,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent,

On Petition For Writ Of Certiorari
To the U. S. Court of Appeals for the 8th Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID P. McMANUS
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47pp

QUESTIONS PRESENTED

This petition is over District Court review of an arbitrators award under the Railway Labor Act. The petitioner was an employee of the respondent railroad and sought certain economic benefits under his collective bargaining agreement for the loss of his position which has been denied by all lower tribunals.

1. Did the arbitrator conform or confine itself to matters within the scope of its jurisdiction in making the award?

(a) Did the Magistrate's decision misapply an otherwise appropriate precept, use of course of dealing to interpret a contract, where the contract is clear on the issue presented?

(b) Did the District Trial Court on review of the Magistrate's decision grant the arbitrator the power to view course of dealing as an alternative to the contract?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are all identified in the caption except that the respondent was also known as the Chicago and North Western Transportaion Company and Chicago and North Western Railway Company.

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OPINIONS BELOW

The judgment of the Eighth Circuit was issued July 23, 1997, but was only a summary denial of a petition for leave to appeal under F. R. A. P. 5.1 because the parties elected to use a magistrate judge to hear the case on the merits and then first appeal to district trial court under Rules of Civil Procedure 73(d) and 74. The judgment of the 8th Circuit, district trial court decision, magistrate decision and the award were unreported but are reprinted in the Appendix.

JURISDICTION

The court has jurisdiction to issue a Writ of Certiorari to the 8th Circuit Court of Appeals under 28 U.S.C.A. § 1254 and this Court's Rule 13.

STATUTES AND CONTRACT PROVISIONS INVOLVED IN THE CASE

STATUTES

45 U.S.C. § 153 "First":

There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is provided . . .

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order . . . The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division

shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure to the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

45 U.S.C. § 153 "Second":

Nothing in this section shall be construed to prevent any individual carrier, system , or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section . . .

. . . Compliance with such awards shall be enforceable by proceedings in the United States

district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

CONTRACT PROVISIONS

Article I, Appendix "D":

The term "permanent abolishment (elimination-discontinuance) of a position" as used herein, is defined as follows:

Section 1. The abolishment, elimination or discontinuance of any position coming under the BRAC Agreement except:

. . .

(c) The abolishment, elimination or discontinuance of ore dock or bridge tender jobs at the end of the navigation season, heater jobs at the end of the heater season, and icing jobs at the end of the icing season.

Other than those referred to in the preceeding paragraph, the abolishment, elimination or discontinuance of a seasonal position at the end of or during the season for which established, provided such position, if established after the effective date of this agreement, was bulletined

as a seasonal position and in the twelve (12) months prior to its abolishment had not been in existence a total of eight (8) months or more.

Article XI, Appendix "D":

The jurisdiction of the Arbitration Board shall be limited to deciding the specific issues submitted to it and the Board shall not have authority to change or modify any provisions of this agreement.

STATEMENT OF THE CASE

Schirm seeks a furlough and housing allowance for the loss of the last position he held with the railroad which stems from part of a collective bargaining agreement known as Appendix "D". Appendix "D" requires such benefits for the "permanent abolishment" of "any position" held with the railroad with quite a number of exceptions, one of which is if the position is seasonal, the case here. But benefits are required if the position lasted 8 months or more in the 12 month period prior to its "abolishment."

March 22, 1993, Schirm, while at that time in "a voluntary furlough status" in Cedar Rapids, Iowa, was awarded seasonal position No. 933, Single Track Operator, Marshalltown, Iowa, which had been "bulletined" as such. Schirm worked the position until it was "abolished" on December 9, 1993. Thus, the position lasted more than 8 months by 17 days.

Article I of this Appendix "D" provides in relevant part:

> The term 'permanent abolishment (elimination-discontinuance) of a posi-tion' as used herein is defined as follows:
>
> Section 1. The abolishment, elimination or discontinuance of any position coming under the BRAC Agreement **except**:
>
> . . .
>
> (c) . . . the abolishment, elimination or discontinuance of a **seasonal** position at the end of or during the season for which established, provided such position, if established after the effective date of this agreement, was bulletined as a seasonal position **and** in the twelve (12) months prior to its abolishment had **not** been in existence a total of **eight (8)** months **or more**. [emphasis added]

July 29, 1996, Public Law Board No. 5595, an alternative to the "National Arbitration Board,"[1] found in paragraph 2 of its "FINDINGS":

> On March 22, 1993, Claimant, who at the time was in a voluntary furlough status at Cedar Rapids,

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[1] The "National Arbitration Board" comes from 153 "First" and the "Public Law Board," the entity here, comes from 153 "Second."

> Iowa, was awarded seasonal Position No. 933, Single Track Operator,[2] Marshalltown, Iowa. He worked the position until it was abolished on December 9, 1993.

but upheld these denials by also finding in paragraphs 3 and 4:

> The record before this Board supports a showing that a single track assignment has historically been considered a 'seasonal assignment.' Single track positions are established to provide protection for maintenance of way workers during the construction season.
>
> Appendix "D" of the controlling[3] Agreement clearly states that the abolishment of a seasonal position will not result in protection for the employee affected. While there is some question in this record whether the assignment worked by Claimant was in existence beyond an "eight month duration," this would not change the fact that a Single Track

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[2] These positions surveille the number of and times trains go by when one of 2 sets of track are under repair so as to avoid collisions and injuries to "maintenance of way" workers who are actually repairing the set not used.

[3] Here the Board recognizes that the collective bargaining agreement is not an "option" or "alternative" to "course of dealing" between the parties. The contract is the only "deal" between them.

> assignment is, and has always been accepted by the parties as a seasonal position on this Carrier.

Copy of its decision is at page 1 of the appendix.

The award is **absolutely silent** on the 8 month proviso.

October 18, 1996 Schirm petitioned the district court in the Northern District of Iowa for review of this award.

April 14, 1997 the Magistrate affirmed the award by saying in relevant part at page 13 of the appendix accompanying this petition:

> The court finds that the Board's decision is a rational interpretation of the collective bargaining agreement made after consideration of the express wording of the agreement and of the past conduct and course of dealing of the parties. [emphasis added]

Schirm appealed this ruling to the district trial court.

June 12, 1997 the district court affirmed, reasoning [App. p. 16]:

> Section 1(c) [appendix D] provides *one way* of identifying which positions are "seasonal" for purposes of the abolishment provision - namely, those positions which are bulletined as seasonal and which last less than 8 months over a 12-month period - but it

> does not *purport* to provide the exclusive means for determining which positions are "seasonal" for purposes of the abolishment provision. Positions that have historically been considered to be "seasonal" and which have been treated as "seasonal" in the course of dealing between the parties, are still "seasonal" for purposes of the abolishment provision. [emphasis added]

REASONS FOR GRANTING THE WRIT

1. Did the arbitrator conform or confine itself to matters within the scope of its jurisdiction in making the award?

(a) Did the Magistrate's decision misapply an otherwise appropriate precept, use of course of dealing to interpret a contract, where the contract is clear on the issue presented?

The statutory standard for decisional review of such awards is in 45 U.S.C. §153 "First"(q):

> . . . for failure of the order to conform, **or** confine itself, to matters within the scope of the division's jurisdiction, . . . [emphasis added]

Court review of such awards is "among the narrowest known to the law." *Union Pacific R R Co. vs. United Trans. Union*, 23 F 3d 1397,

1399 [1] (CA 8 1994). But in keeping with others the eighth said in *George A. Hormel & Co. vs. United Food Workers, Local 9*, 879 F 2d 347, 351 [4] (CA 8 1989):

> We believe that where an arbitrator fails to discuss a probative contract term and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract.[4]

The award here wholly fails to even mention the 8 month proviso and thus fails to discuss a probative contract term. At the same time it offers no "clear basis" for how it construed the contract to reach its decision without "such consideration" because the award merely repeats the "seasonal position" portion of this appendix D without more.

The railroad and the courts below have characterized the award's perspective as looking to some historical practice or course of dealing between the parties (which negates this 8 month proviso without saying <u>how</u> this was achieved.)

In a Labor Management Relations Act case of the Eighth Circuit *Coca Cola Bottling Co. vs.*

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[4] This case was decided under the Labor Management Relations Act but the scope of review seems to be the same. The cases variously say that to set aside such awards they must be "without foundation in reason or fact" and/or fail to "draw their essence from the collective bargaining agreement." See *BRAC v. Kansas Cy R.R.*, 587 F 2d 903, 908 [3, 4] (CA 8 1978)

Teamsters, 959 F 2d 1438, 1442 (CA 8 1992) the court held:

> The arbitrator did not have authority to alter the agreement by interpreting unambiguous language in a way contrary to its plain meaning, while attempting to characterize his actions outside of his authority as fact-finding.

In *Northwest Airlines vs. Int'l Asso. of Machinists*, 894 F 2d 998 (CA 8 1990)[5] this court remarked at 999 lft. col 3rd full ¶, from language in the award it was reviewing, that the arbitrator recognized he was:

> . . . committed to the general rule of interpretation which holds that where no ambiguity can be found on the face of a written agreement . . . then its clear and plainly drawn terms must govern the outcome.

The magistrate's perspective that the award merely used course of dealing to interpret the contract can only apply if the contract is ambiguous in some measure. As the term "seasonal position" is not defined and as the "single track operator" position is not expressly listed (like the ore dock, bridge tender etc. jobs are) then the Board had to go outside the contract to course of dealing to

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[5] Though not clear from the opinion, but because an airline was a party, the case must have been decided under the Railway Labor Act. But, as § 181 excludes § 153, then it *may* have been decided under § 159 "Third."

assist it in situating the single track position into the contractual terms (whether "permanent" or "seasonal"). Once it did however, finding it "seasonal," it had to go back to the contract and implement the 8 month proviso. There is no ambiguity in this proviso, one on which the award is completely silent.

(b) Did the District Trial Court on review of the Magistrate's decision grant the arbitrator the power to view course of dealing as an alternative to the contract?

The language excerpted at pp. 8-9 of the petition from the district trial court's decision begins by saying that "Section 1(c). . ." gives "one way" of "identifying" seasonal positions. Although this implies there is another contract term doing so, the "other way" must be as excerpted at p. 9 of the petition:

> Positions that have historically been considered to be "seasonal," and which have been treated as "seasonal" in the course of dealing between the parties, are still "seasonal" for purposes of the abolishment provision. [emphasis added]

which must be non-contractual. This view, it is respectfully suggested, is well beyond that taken by *all circuits*, not just the eighth, in reviewing such awards.[6]

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[6] And by the Board here, see p. 7 n. 3 of this petition. See also, *Norfolk & Western Ry v. Transportation Communication Int'l Union*, 17 F 3d 696, 700 (CA 4 1994)

It is clear that when the contract is unambiguous on a certain issue then it is indeed the only "way" available. It is only when the contract is (1) ambiguous or (2) silent on an issue, that course of dealing can be used. In (1) the express provision available is not sufficiently specific to answer the question raised. In (2) there is no contractual provision at all.

The district trial court's perspective that course of dealing is an alternative to the contract does not give effect to <u>any</u> of its provisions, let alone the 8 month proviso. The only proper use of "course of dealing" here is to situate the single track operator position within the relevant provisions of the contract (whether permanent or seasonal) because the single track position was not listed like the ore dock, bridge tender jobs were nor was the term "seasonal position" defined.

The contract does indeed "purport" to give the exclusive means of identifying seasonal positions because it continues that such positions must be "bulletined as seasonal" which, ironically, describes an exclusive method of "course of dealing."

However, once use is made of the "bulletined as seasonal" clause/"course of dealing," to find the position's *nature* as "seasonal," then the Board had to go back into the contract for its *duration* and use the 8 month proviso. It did not do this at all, nor give any "basis," let alone a "clear" one, as to why.

This case is in keeping with Judge Posner's classic description of the narrow scope of review of such awards in *Hill v. Norfolk and Western Railway Co.*, 814 F 2d 1192, 1194-95 [1-4] (CA 7 1987) where he says that the question for decision:

> . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; **it is whether they interpreted the contract** . . .If they did, their interpretation is conclusive . . . A party can complain if the arbitrators don't interpret the contract - that is, if they disregard the contract and implement their own notions of what is reasonable or fair . . . [emphasis added]

The requirement that the award "draw its essence"[7] from the contract is consistent with this classic perception where a contract provison is available to answer a question raised. The other, that there must be "foundation in reason or fact" must address cases where the provison is too ambiguous to do so or where no such provision exists.

Though the award "drew its essence" from the seasonal position clause on the *nature* of "single track operator," it disregarded the 8 month proviso on its *duration*. It is without foundation in reason or fact as to why because it merely repeated the position's seasonal nature.

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[7] See p. 10 n. 4 of this petition.

The Board didn't even implement its own notions of what was reasonable or fair. It implemented nothing at all.

CONCLUSION

This court should grant the petition for certiorari and reverse the decisions below with remand to the Board for computation of benefits only, since it disregarded the unambiguous 8 month proviso in light of its finding the position exceeded 8 months.

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APPENDIX

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5595

John C. Fletcher, Chairman & Neutral Member
Joseph P. Condo, Employee Member
M.D. Phillips, Carrier Member

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

V.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY

Award No. 32
Docket No. 32

Date of Hearing - September 25, 1995
Date of Award -July 29, 1996

STATEMENT OF CLAIM:

Claim in behalf of Mr. Donald C. Schirm for Appendix "D" benefits (furlough allowance and 12 per cent of the fair market value for sale of his home).

FINDINGS:

Public Law Board No. 5595, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, the Board has jurisdiction over the dispute(s) herein; and,

that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

On March 22, 1993, Claimant, who at the time was in a voluntary furlough status at Cedar Rapids, Iowa, was awarded seasonal Position No. 933, Single Track Operator, Marshalltown, Iowa. He worked the position until it was abolished on December 9, 1993. Following the abolishment Claimant requested Appendix "D" benefits, contending that the "single track operator position had been in existence for more than a total of eight months." Claimant's requests for Appendix "D" benefits were denied on February 4, 1994, and again on February 21, 1994.

The record before this Board supports a showing that a single track assignment has historically been considered a "seasonal assignment." Single track positions are established to provide protection for maintenance of way workers during the construction season.

Appendix "D" of the controlling Agreement clearly states that the abolishment of a seasonal position will not result in protection for the employee affected. While there is some question in this record whether the assignment worked by Claimant was in existence beyond an "eight month duration," this would not change the fact that a Single Track assignment is, and has always been accepted by the parties as a seasonal position on this Carrier.

Claimant, as the occupant of a seasonal position is, therefor, not entitled to the protective benefits requested. His claim is denied.

AWARD

Claim denied.

s/
John C. FLETCHER, Chairman & Neutral Member

s/
M.D. PHILLIPS
Carrier Member
Member

s/
Joseph P. CONDO
Employee

Dated at Mt. Prospect, Illinois, July 29, 1996

FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA
APR 14 1997 041197VJ
3:45 pm C 96 0319
CEDAR RAPIDS HDQTRS. OFFICE
By s/

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

DONALD C. SCHIRM,	)	
	)	
Plaintiff,	)	NO. C 96-0319
	)	
vs.	)	ORDER
	)	
	)	
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY f/k/a CHICAGO AND NORTH WESTERN RAILWAY COMPANY n/k/a UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	

This matter comes before the court pursuant to the plaintiff's February 7, 1997 motion for summary judgment (docket number 9) and the defendant's April 9, 1997 motion for summary judgment (docket number 28).[1] The

[1] The issues in this case are fully developed pursuant to plaintiff's motion for summary judgment. The court has not waited for plaintiff's resistance to defendants'

parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). For the reasons set forth below, the court denies the plaintiff's motion for summary judgment and grants the defendant's motion.

In this case, plaintiff seeks judicial review of an arbitration award issued by the National Mediation Board Public Law Board No. 5595 under the Railway Labor Act, 45 U.S.C.A. §§ 151 et seq. (1986). Plaintiff moves for summary judgment arguing that the Public Law Board wholly failed to even consider or mention the part of the collective bargaining agreement that provides that "protective benefits" are available where an abolished position lasted longer than eight months before abolishment. Defendant also moves for summary judgment, asserting that the decision of the Public Law Board is rationally explainable as a logical means of furthering the aims of the collective bargaining agreement, is not without foundation in reason or fact and is therefore within the jurisdiction of the Board.

Summary Judgment

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not

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April 9, 1997, motion for summary judgment because it presents no new issues.

rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987), cert. denied, 484 U.S. 1014 (1988) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985), cert. denied, 474 U.S. 1057 (1986) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983), cert. denied, 465 U.S. 1026 (1984)).

Statement of Material Facts About Which There is No Genuine Issue

On March 22, 1993, plaintiff Donald Schirm was awarded the position of Single Track Operator, seasonal position No. 933, by his employer, Chicago and North Western Transportation Company,[2] a railroad company with operations in the state of Iowa and corporate headquarters in Omaha, Nebraska. A Single Track Operator protects crews who are

[2] In May of 1994 the name of the company was changed to Chicago North and Western Railway Company. In October of 1995, Chicago North and Western Railway merged with Union Pacific Railroad Company, the real party in interest in this action.

working on track projects during the construction season from train traffic. Schirm held this position, which was bulletined as a seasonal position, until the position was abolished on December 9, 1993. After his position was abolished, Schirm applied for the benefits provided for in Article IV(a) of Appendix D[3] of the collective bargaining agreement, contending that he was entitled to such benefits because his job Single Track Operator existed for more than eight months.[4]

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[3] Article IV(a) of Appendix D to the collective bargaining agreement provides:

> No protected employee of the carrier coming under the scope of the [collective bargaining agreement] who is continued in service after having been adversely affected by force reduction resulting from permanent abolishment of a position shall, for a period not exceeding five (5) years following the effective date of such force reduction, be placed, as a result of such force reduction, in a worse position with respect to compensation and rules governing working conditions than he occupied at the time of such force reduction, except, however, that if he fails to exercise his seniority rights to secure another available position which does not require a change of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

[4] Article I, section 1(c) of the agreement defines "permanent abolishment" as:

These benefits included relocation stipends and guaranteed pay for five years.

The National Mediation Board Public Law Board No. 5595[5] found that Schirm was not entitled to these benefits because Schirm's position, Single Track Operator, lasted only during the construction season and therefore had always been considered a seasonal position. The Board stated in its findings:

> The record before this Board supports a showing that a single track assignment has historically been considered a "seasonal

---

> The abolishment, elimination or discontinuance of any position coming under the [collective bargaining agreement], except:
>
> (c) The abolishment, elimination, or discontinuance of ore dock or bridge tender jobs at the end of the navigation season, heater jobs at the end of the heater season, and icing jobs at the end of the icing season. Other than those referred to in the preceding paragraph, the abolishment, elimination or discontinuance of a seasonal position at the end of or during the season for which established, provided such position, if established after the effective date of this agreement, was bulletined as a seasonal position and in the twelve (12) months prior to its abolishment had not been in existence a total of eight (8) months or more.

[5] Public law boards, sanctioned under the Railway Labor Act, are created by an agreement between unions and employers to serve as an alternative to compulsory arbitration before the National Railroad Adjustment Board. Union Pacific R.R. Co. v. United Transp. Union, 23 F.3d 1397, 1398 (8th Cir. 1994) (citing 45 U.S.C.A. § 153 Second (1986)).

assignment." Single track positions are established to provide protection for maintenance of way workers during the construction season.

Appendix "D" of the controlling Agreement clearly states that the abolishment of a seasonal position will not result in protection for the employee affected. While there is some question in this record whether the assignment worked by Claimant was in existence beyond an "eight month duration," this would not change the fact that a Single Track assignment is, and always has been accepted by the parties as a seasonal position on this carrier.

Transportation Communications Int'l Union v. Chicago and North Western Transp. Co., Award No. 32, Docket No. 32 (July 29, 1996) (Fletcher, Arb.).

Conclusions of Law

Schirm filed this action for judicial review pursuant to Section 153, First (q) of the Railway Labor Act, 45 U.S.C.A. §§ 151 et seq. (1986).[6]

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[6] Section 153 First (q) provides, in pertinent part:

> If any employee or group of employees, or any carrier is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such an award, then such employee or group of employees or carrier may file in any United States district court

Schirm moves for summary judgment on his claim that this court should reverse the decision of Public Law Board No. 5595, asserting that the Board failed to conform or to confine its order to matters within the scope of its jurisdiction when it found that Schirm had worked in the Single Track Operator for more than eight months but failed to allow Schirm benefits under Article IV(a) of Appendix D. Schirm argues, in essence, that the Board exceeded the scope of its authority when it considered past conduct of the parties when interpreting the collective bargaining agreement. Union Pacific moves for summary judgment contending that this court should enforce the Board's ruling as the Board's interpretation of the collective bargaining agreement is supported by a rational basis in both the written terms of the agreement and in the conduct of the parties.

The scope of judicial review of arbitration awards under the Railway Labor Act is "'among the narrowest known to the law.'" Union Pacific R.R. Co. v. United Transp. Union, 23 F.3d 1397, 1399 (8th Cir. 1994) (quoting International Ass'n of Machinists v. Northwest Airlines, 858 F.2d 427, 429 (8th Cir. 1988)). The Railway Labor Act allows courts to set aside board orders on three grounds: (1) failure of the board to comply with the requirements of the Act; (2) failure of the board's order to confine itself to matters within the scope of the board's jurisdiction; and (3) fraud or corruption. 45 U.S.C.A. § 153, First (q). See Union Pacific R.R.

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in which a petition under paragraph (p) could be filed, a petition for review of the division's order . . . .

v. Sheehan, 439 U.S. 89, 93 (1978) (per curiam).

An award fashioned by a public law board may be enforced as within the scope of the board's jurisdiction unless it is "'without foundation in reason or fact.'" Union Pacific R.R. Co. v. United Transp. Union, 23 F.3d at 1399 (quoting International Ass'n of Machinists, 858 F.2d at 430). In discerning whether a board has exceeded its authority, "the agreement must be broadly construed with all doubts resolved in favor of the [board's award." Id. (quoting Walsh v. Union Pacific R.R., 803 F.2d 412, 414 (8th Cir. 1986), cert. denied, 482 U.S. 928 (1987)). The "'test of the [b]oard's jurisdiction is not whether the reviewing court agrees with the [b]oard's interpretation of the bargaining contract, but whether the remedy fashioned by the [b]oard is rationally explainable as a logical means of furthering the aims of the contract.'" Id. (quoting Brotherhood of Ry., Airline & Steamship Clerks v. Kansas City Terminal Ry., 587 F.2d 903, 906-07 (8th Cir. 1978), cert. denied, 441 U.S. 907 (1979)). See also Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914, 921 (7th Cir. 1985) ("[A]n arbitrator's award may be overturned only if the reviewing court is convinced that he was not trying to interpret the collective bargaining contract but that instead he resolved the parties' disputes according to his private notions of justice. The test is not error; it is ultra vires.").

The United States Supreme Court has made it clear that collective bargaining agreements may include implied, as well as express, terms. Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299,

310 (1989). The Court has recognized that "practice, usage and custom is of significance in interpreting [a collective bargaining] agreement." Id. (citing Transportation Union v. Union Pacific R.R. Co., 385 U.S. 157, 161 (1966)). In Consolidated Rail Corporation, 491 U.S. at 310, the Court stated:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common law concepts which control such private contracts. '[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or of a particular plant.'" [Transportation Union v. Union Pacific R.R. Co., 385 U.S.] at 160-61 (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960)).

In this case, Public Law Board No. 5595 reviewed the operative provisions of the collective bargaining agreement, Articles I and IV(a) of Appendix D, and concluded that the agreement "clearly states that the abolishment of a seasonal position will not result in protection for the employee affected." The Board considered and rejected Schirm's contention that permanent abolishment of his position, although it may have been considered a seasonal position, entitled him to benefits

because he had held the position for more than eight months. The Board's decision was based upon its finding that, in the past, the position of Single Track Operator had been treated as a seasonal position and was not intended by the parties to be a position that, when abolished, gave rise to benefits for the terminated employee. The court finds that the Board's decision is a rational interpretation of the collective bargaining agreement made after consideration of the express wording of the agreement and of the past conduct and course of dealing of the parties. The Board was not acting beyond the scope of its jurisdiction in denying Schirm the benefits he requested. Thus, the court grants the defendant's motion for summary judgment on the issue of whether this court should enforce the ruling of Public Law Board No. 5595.

Upon the foregoing,

IT IS ORDERED

1. Defendant Union Pacific's March 17, 1997, motion for extension of time (docket number 22) is granted.

2. Defendant Union Pacific's March 19, 1997, motion to strike (docket number 23) is granted.

3. The defendant's motion for summary judgment (docket number 28) is granted.

4. The plaintiff's motion for summary judgment (docket number 9) is denied.

5. The Clerk of Court shall enter judgment accordingly. April 14, 1997.

s/_____
JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

Copies mailed on APR 14 1997
to counsel of record or pro se
parties as shown on the docket
sheet.

s /_____
Deputy Clerk

FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA
JUN 12 1997
8:30 am
CEDAR RAPIDS HDQTRS. OFFICE
By s/

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

DONALD C. SCHRIM,	)
	)
Plaintiff-appellant,	)
	)
v.	)Civ. No. C96-0319
	)MJM
	)
CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY f/k/a CHICAGO AND NORTH WESTERN RAILWAY COMPANY n/k/a UNION PACIFIC RAILROAD COMPANY,	)On Appeal From the)United States District)Court for the)Northern)District of Iowa,)Honorable)John A. Jarvey, Chief)Magistrate Judge
	)
Defendant-appellee.	)

Opinion and Order

I. Discussion

Donald Schrim appeals from Judge Jarvey's Opinion and Order denying his petition for review of an arbitration award issued by

Public Law Board #5595 pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1986). Judge Jarvey's Opinion and Order is affirmed for the reasons set forth therein. The decision of the Public Law Board is well within the bounds of interpretation of the collective bargaining agreement at issue here. According to the Board, Article I, Section 1(c) of Appendix D stands for no more than the proposition that "seasonal" positions may be abolished without incurring liability for benefits under Article IV(a), so long as the positions really are "seasonal." Section 1(c) provides one way of identifying which positions are "seasonal" for purposes of the abolishment provision - namely, those positions which are bulletined as seasonal and which last less than 8 months out of a 12-month period - but it does not purport to provide the exclusive means for determining which positions are "seasonal" for purposes of the abolishment provision. Positions that have historically been considered to be "seasonal" and which have been treated as "seasonal" in the course of dealing between the parties, are still "seasonal" for purposes of the abolishment provision.

As Judge Jarvey held, the Board's interpretation, whether correct or not, is not "without foundation in reason or fact." See Order, at 8, *quoting* Union Pacific Railroad Co. v. United Transportation Union, 23 F.3d 1397, 1399 (8th Cir. 1994); see also Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railway Co., 768 F.2d 914, 921 (7th Cir. 1985). Accordingly, Judge Jarvey's resolution of this case must be affirmed, and the petition for review denied.

II. Conclusion

For the foregoing reasons, the decision of the Magistrate Judge, Doc. #31, is AFFIRMED. The motion of appellee to strike Exhibit I, Doc. #42, is DENIED without prejudice as moot. Pursuant to Rule 76(b) of the Federal Rules of Civil Procedure, this decision shall be stayed for ten (10) after its entry.

Done and So Ordered this 12th day of June, 1997.

s/
Chief Judge Michael J. Melloy
United States District Court for the
Northern District of Iowa

Copies mailed on JUN 12 1997
to counsel of record or pro se
parties as shown on the docket
sheet.

s/
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-8137NICR

Donald C. Schirm,	*	
	*	
Petitioner,	*	Petition for
	*	Permission
	*	To Appeal
v.	*	
	*	
Union Pacific Railroad Company,	*	
	*	
Respondent.	*	

JUDGMENT

Petitioner's petition for leave to appeal has been considered by the court and is denied.

July 23, 1997

A true copy.

ATTEST s/

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
OCT 16 1997
CLERK

No. 97-488

In The

Supreme Court of the United States

October Term, 1997

DONALD C. SCHIRM,

Petitioner,

vs.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED FOR REVIEW

SHOULD THIS COURT EXERCISE ITS DISCRETION TO GRANT THE PETITION FOR WRIT OF CERTIORARI WHEN NO RULE 10 GROUNDS FOR GRANTING THE PETITION EXIST AND WHEN THE NATIONAL MEDIATION BOARD PUBLIC LAW BOARD NO. 5595 DID NOT EXCEED ITS JURISDICTION IN ENTERING AWARD NO. 32, DOCKET 32?

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I.

STATEMENT OF THE CASE

National Mediation Board Public Law Board No. 5595 entered Award No. 32, Docket 32 (Appendix to Petition for Writ, page 1), pursuant to the Railway Labor Act, 45 U.S.C. § 153, First (q), ruling that Petitioner Schirm was not entitled to Appendix D benefits under the applicable Collective Bargaining Agreement. Petitioner Schirm commenced this action for judicial review of Award No. 32 in the United States District Court for the Southern District of Iowa. Pursuant to Rule of Civil Procedure 73, the parties consented to the exercise of civil jurisdiction over the case by Magistrate-Judge John Jarvey who upheld Award No. 32. The parties had also consented to the Optional Appeal Route under Rule of Civil Procedure 73(d) and Magistrate-Judge Jarvey's Ruling was affirmed by United States District Judge Michael Melloy. Schirm then filed a Petition for Permission to Appeal to the United States Court of Appeals for the Eighth Circuit pursuant to Rule of Civil Procedure 73(d). The Eighth Circuit Court of Appeals' July 23, 1997 Judgment denied Schirm's Petition for Permission to Appeal. (Appendix to Petition for Writ, p. 18).

Petitioner Schirm claims that his job as a Single Track Operator existed more than eight months, was then abolished, and that he is therefore entitled to Collective Bargaining Agreement, Appendix D, benefits. A Single Track Operator protects maintenance of way crews working on track projects during the construction season from dangers of train traffic. The National Mediation Board Public Law Board No. 5595 in Award No. 32, Docket No. 32,

ruled that the parties to the Collective Bargaining Agreement never intended Appendix D benefits to apply to Single Track Operator jobs, which on this (northern) railroad have always begun and ended with the construction season. The Board found:

> The record before this Board supports a showing that a single track assignment has historically been a "seasonal assignment." Single track positions are established to provide protection for maintenance of way workers during the construction season.
>
> Appendix "D" of the controlling Agreement clearly states that the abolishment of a seasonable position will not result in protection for the employee affected. While there is some question in this record whether the assignment worked by Claimant was in existence beyond an "eight month duration," this would not change the fact that a Single Track assignment is, and has always been accepted by the parties as a seasonal position on this Carrier.
>
> Claimant, as the occupant of a seasonal position is, therefor, not entitled to the protective benefits requested. His claim is denied.

(Appendix to Petition for Writ, pp. 2-3).

II.

ARGUMENT

A. THERE IS NO IMPORTANT FEDERAL MATTER RAISED BY SCHIRM'S PETITION FOR WRIT OF CERTIORARI.

The principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 111 S. Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991). Supreme Court Rule 10 sets out three basic grounds that may compel this Court to exercise its discretion to grant a petition for writ of certiorari. Schirm's Petition for Writ of Certiorari embodies none of these grounds. The proceedings below involve no important question of federal law that has not been, but should be, settled by this Court; and the Eighth Circuit Court of Appeals has not decided an important federal question in a way that conflicts with relevant decisions of this Court or that conflicts with the decision of another United States Court of Appeals on an important matter. The Eighth Circuit Court of Appeals' Judgment is unreported, as are the Opinions of United States District Judge Michael Melloy and United States Magistrate-Judge John Jarvey.

Further, the Judgment of the Eighth Circuit Court of Appeals does not decide any federal question but only states that Court's refusal to exercise its discretion under Rule of Civil Procedure 73(d) to hear an appeal of Judge Melloy's Ruling. The Eighth Circuit Court of Appeals'

Judgment is at the opposite pole from an important federal question. Petitioner Schirm consented to the Optional Appeal Route of RCP 73(d). The Advisory Committee Notes to RCP 73(d) state:

> This optional appellate route was provided by Congress in recognition of the fact that not all civil cases warrant the same appellate treatment.

At page 12 of Schirm's Petition for Writ of Certiorari, he complains that language from the opinion of United States District Court Judge Melloy conflicts with the decisions of *all circuit courts of appeal including the Eighth Circuit*. A conflict between a United States District Court decision and decisions of circuit courts of appeal does not merit the grant of a petition for writ of certiorari.

Petitioner Schirm's statement of the Questions Presented shows conclusively that his Petition should not be granted. Petitioner Schirm's Questions Presented (Petition for Writ, p. i) state that the rule of law allowing the use of course of dealing evidence to interpret a contract was erroneously applied in proceedings below. Petitioner Schirm's other complaint is that Public Law Board No. 5595 made erroneous fact findings when it failed to find that the Single Track Operator position had been in existence more than eight months before it was abolished. (Petition for Writ, p. 5). Supreme Court Rule 10 instructs:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

These are the precise types of errors asserted here by Petitioner.

B. THE NATIONAL MEDIATION BOARD PUBLIC LAW BOARD NO. 5595 DID NOT EXCEED ITS JURISDICTION WHEN IT ENTERED AWARD NO. 32, DOCKET 32, AND THE COURTS' RULINGS DENYING PETITIONER'S APPEALS WERE CORRECT IN UPHOLDING THE BOARD'S AWARD.

The correct standard of review of a Railway Labor Act arbitration award is explained in *Union Pacific R.R. Co. v. United Transportation Union* [Gray], 23 F.3d 1397, 1399 (8th Cir. 1994):

> The scope of judicial review of arbitration awards under the Railway Labor Act is " 'among the narrowest known to the law.' " *International Assn' of Machinists v. Northwest Airlines*, 858 F.2d 427, 429 (8th Cir. 1988) (*quoting Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233 (5th Cir. 1970)). The Act provides that courts may set aside board orders on three grounds: (1) failure of the board to comply with the requirements of the Act; (2) failure of the board's order to confine itself to matters within the scope of the board's jurisdiction; and (3) fraud or corruption. *See* 45 U.S.C. Sec. 153, First (q); *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 99 S. Ct. 399, 402, 58 L.Ed.2d 354 (1978) (per curium). . . .
>
> A public law board award is enforceable as within the scope of the board's jurisdiction unless the award is " 'without foundation in reason or fact.' " *International Ass'n of Machinists*, 858 F.2d at 430 (*quoting Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 414 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008, 90 S. Ct. 564, 24 L.Ed.2d 500 (1970)). In determining whether the Board exceeded its authority, "the

> agreement must be broadly construed with all doubts resolved in favor of the [Board's] award." *Walsh v. Union Pacific R.R.*, 803 F.2d 412, 414 (8th Cir. 1986), *cert. denied*, 482 U.S. 928, 107 S. Ct. 3213, 96 L.Ed.2d 699 (1987). "Ambiguities in the opinion accompanying an award are normally not a reason for refusing to enforce an award." *Id.* Further, the " 'test of the Board's jurisdiction is not whether the reviewing court agrees with the Board's interpretation of the bargaining contract, but whether the remedy fashioned by the Board is rationally explainable as a logical means of furthering the aims of that contract.' " *Brotherhood of Ry., Airline & Steamship Clerks v. Kansas City Terminal Ry.*, 587 F.2d 903, 906-07 (8th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S. Ct. 1997, 60 L.Ed.2d 376 (1979) (*quoting Diamond*, 421 F.2d at 233).

Public Law Boards must take account of implied terms of collective bargaining agreements that are the product of long-standing concurrence of the railroad and union. *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 312, 109 S. Ct. 2477, 105 L.Ed.2d 250, 267 (1989) (holding that employees disputing Conrail's unilateral decision on drug testing based on an implied term in the Collective Bargaining Agreement must use Railway Labor Act arbitration as their exclusive remedy); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 442 F.2d 251, 254-255 (8th Cir. 1971), *cert. denied*, 404 U.S. 871, 92 S. Ct. 70, 3 L.Ed.2d 116 (1971). The United States Supreme Court in *Consolidated Rail*, at 109 S. Ct. 2485, described the necessity and importance of an arbiter's knowledge of and enforcement of implied collective bargaining agreement terms:

> This case, then, turns on whether the inclusion of drug testing in periodic and return-from-leave physical examinations is arguably justified by the parties' collective-bargaining agreement. Neither party relies on any express provision of the agreement; indeed, the agreement is not part of the record before us. As the parties acknowledge, however, collective-bargaining agreements may include implied, as well as express, terms. *See, e.g., Northwest Airlines, Inc. v. Air Line Pilots Assn. Int'l*, 442 F.2d 251, 253-254 (CA8), *cert. denied*, 404 U.S. 871, 92 S. Ct. 70, 30 L.Ed.2d 116 (1971). Furthermore, it is well established that the parties' "practice, usage and custom" is of significance in interpreting their agreement. *See Transportation Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 161, 87 S. Ct. 369, 371, 17 L.Ed.2d 264 (1966). This Court has observed: "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. ' . . . [It] is a generalized code to govern a myriad of cases [491 U.S. 312] which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant.' " *Id.*, at 160-161, 87 S. Ct., at 371 (citation omitted) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S., at 578-579, 80 S. Ct., at 1350-1351).

The Appendix D agreement was executed April 26, 1972. The Public Law Board found that historically Single Track Operator jobs were seasonal. This was true long before Appendix D was executed as well as after its

execution. It was not the intention of the parties to provide Single Track Operator jobs Appendix D benefits. The Board so found based on the long-standing practice of the Railroad and the Union.

Additionally, the Record provided to the United States District Court Clerk by the National Mediation Board shows in Carrier's Exhibit A (Respondent's Appendix, p. 1, Carrier's Exhibit A, October 5, 1994 letter from F.J. Patitucci) that the 1993 Flood in Iowa caused the abolishment of the job for two weeks in July 1993 and thus supports the Board's failure to make a finding that the assignment worked by Mr. Schirm had been in existence beyond eight months.

Schirm contends the Public Law Board made erroneous fact findings in its Award denying Schirm Appendix D benefits. Schirm's Petition for Writ of Certiorari relies on the misconception that accepted common law rules for enforcement of private contracts govern enforcement of collective bargaining agreements under the Railway Labor Act and that such a rule was misapplied in this case. Although Public Law Board arbiters are chosen for their knowledge of the railroad industry, Petitioner Schirm contends they exceed their authority when they make use of that knowledge in making fact findings.

III.

CONCLUSION

There is no important federal matter raised by Schirm's Petition for Writ of Certiorari. The Ruling of the Eighth Circuit Court of Appeals was only a decision not

to exercise its discretion to hear an appeal of the decision of United States District Judge Melloy. Schirm's Petition (at p. 12) complains only that the opinion of Judge Melloy conflicts with the decisions of all circuit courts of appeal including the Eighth Circuit. Further, Magistrate-Judge Jarvey's Ruling and United States District Judge Melloy's Ruling on Appeal correctly held that the Public Law Board did not exceed its jurisdiction. Therefore, Respondent Union Pacific Railroad Company seeks as relief from this Court a denial of Schirm's Petition for Writ of Certiorari.

Respectfully submitted,

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Union Pacific Railroad Company

Counsel of Record

RESPONDENTS' APPENDIX

CARRIER'S EXHIBIT A

Chicago and North Western
Transportation Company

[LOGO]

One North Western Center
Chicago, Illinois 60606

Labor Relations Department

October 5, 1994

Mr. Sam Siriano
414 North Orleans Street
Suite 304
Chicago, IL 60610

Reference: TCU File No. 17-94-APP. D-79
C&NW File No. 78-94-79
Appeal Dated August 17, 1994

Dear Sir:

Please refer to the above-identified case described by you as follows:

> " . . . claim in behalf of Mr. Donald C. Schrim for Appendix D benefits (furlough allowance and 12 per cent of the fair market value for sale of home). Initial request's were denied on dates of February 4, 1994 and February 21, 1994."

Claimant was in a voluntary furlough state at his headquarters point of Cedar Rapids, Iowa. On March 22, 1993, claimant was awarded Position No. 933, seasonal single

track operator, at Marshalltown, Iowa. The position was abolished on December 9, 1993. A claim has been submitted for payment of a furlough allowance and for payment of the fair market value of Claimant's home on the basis that the carrier violated Appendix "D," contending that the single track operator position had been in existence for more than a total of eight months.

Claimant is not entitled to additional compensation as claimed. There is no dispute between the carrier and the Organization that single-track jobs on this property have historically been considered seasonal positions. Contrary to your position, single-track jobs are created to cover the construction season. Single-track jobs fall into the category as contemplated in Article 1 of Appendix D, Section C.

This fact notwithstanding, information furnished this office indicates that the position in question was not in existence for longer than a "total of eight months" as this position was abolished in the month of July for an approximate two-week period due to flooding in Iowa. This does not, however, negate the fact that, even if the position were in existence for beyond eight months, it is a seasonal position and has always been considered as such by both the carrier and the Organization.

Based on the fact that the position in question is a seasonal position, claimant would not be entitled to the benefits as requested under Appendix D of the TCU Agreement. In order to qualify for the benefits as requested in your appeal, claimant would have to be affected by the abolishment of a permanent position. Since this is not the case, claimant is not eligible for these benefits.

Based on the foregoing and for all reasons previously given, this claim must remain declined in its entirety due to lack of support from schedule rules and agreements.

Very truly yours,

/s/ FP 10/5/94
F. J. Patitucci
Labor Relations (Non-Operating)